IN THE

Supreme Court of the United States

October Term, 1947
No. 82

COLUMBIA PICTURES CORPORATION AND COLUMBIA PICTURES OF LOUISIANA, INC.,
Appellants,

against

UNITED STATES OF AMERICA,
Respondents,

and

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., KEITH-ALBEE-ORPHEUM CORPORATION, RKO PROCTOR CORPORATION, RKO MIDWEST CORPORATION, WARNER BROS. PICTURES, INC., VITAGRAPH, INC., WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, NATIONAL THEATRES CORPORATION, SCREEN GEMS, INC., UNIVERSAL CORPORATION, UNIVERSAL PICTURES COMPANY, INC., UNIVERSAL FILM EXCHANGES, INC., BIG U FILM EXCHANGE, INC., AND UNITED ARTISTS CORPORATION,
Defendants-Appellants.

REPLY BRIEF ON BEHALF OF APPELLANTS, COLUMBIA PICTURES CORPORATION AND COLUMBIA PICTURES OF LOUISIANA, INC., REFERRED TO AS COLUMBIA

SCHWARTZ & FROHLICH,
Attorneys for Appellants Columbia.

LOUIS D. FROHLICH,
ARTHUR H. SCHWARTZ,
of Counsel.
New York City, N. Y.

IN THE

Supreme Court of the United States

October Term, 1947

No. 82

COLUMBIA PICTURES CORPORATION AND COLUMBIA PICTURES OF LOUISIANA, INC.,

Appellants,

against

UNITED STATES OF AMERICA,

Respondents,

and

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., KEITH-ALBEE-ORPHEUM CORPORATION, RKO PROCTOR CORPORATION, RKO MIDWEST CORPORATION, WARNER BROS. PICTURES, INC., VITAGRAPH, INC., WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, NATIONAL THEATRES CORPORATION, SCREEN GEMS, INC., UNIVERSAL CORPORATION, UNIVERSAL PICTURES COMPANY, INC., UNIVERSAL FILM EXCHANGES, INC., BIG U FILM EXCHANGE, INC., AND UNITED ARTISTS CORPORATION,

Defendants-Appellants.

REPLY BRIEF ON BEHALF OF APPELLANTS, COLUMBIA PICTURES CORPORATION AND COLUMBIA PICTURES OF LOUISIANA, INC., REFERRED TO AS COLUMBIA

The Government in its Appellees' Brief (p. 39) attempts to sustain the District Court finding on block-booking by pretending that block-booking is tied up with franchise agreements; and since franchise agreements have been held illegal, block-booking must also be illegal.

This is merely an attempt by the Government to evade the issues presented on block-booking. Unable to find any proof in this record which would stamp block-booking as an illegal practice, the Government takes refuge in attempting to classify block-booking with franchise agreements, knowing of course that appellants are not questioning the decree with respect to franchise agreements.

At the time of the trial appellants had in force *four* franchise agreements, and reference was made to them in four of the Government exhibits as follows:

> *Gov. Ex. 265*—A three year agreement between Columbia and the Fox Theatres in Spokane, Washington.
>
> *Gov. Exs. 266-266a*—An agreement between Columbia and Warner's in Philadelphia, Pa.; this is a one year franchise with a two year renewal.
>
> *Gov. Ex. 471*—A three year agreement between Columbia and Loew's for the Metropolitan area in New York City.
>
> *Gov. Ex. 472*—A three year agreement between Columbia and Fox Inter-Mountain for certain of the Western States.

Columbia had never entered into any long term franchise agreements. It had a small number of four year agreements, but the great majority of its franchise agreements were for two or three years.

There is in evidence (Ex. C-9a) an available list of Columbia franchises from 1937 to date. This shows that in a ten-year period Columbia gave franchises to 46 affiliates and to 468 independents.

In its Appellees' Brief (p. 44), the Government, adding up the number of theatres which had been affected by Columbia franchise agreements, comes to a total of 829. But those theatres are only affiliated theatres. From the same exhibit it is disclosed that Columbia franchise agreements in the ten-year period also affected independent theatres to the number of 1,182. Taking these two figures together it is clear from the statistics alone that Columbia gave franchises more liberally to independents than it did to affiliates.

In any event, the District Court held that franchises were illegal. From that much of the decree appellants have not appealed.

The District Court defined a franchise agreement as follows (Finding No. 1, R. 3660):

> "*Franchise*—A licensing agreement, or series of licensing agreements, entered into as part of the same transaction, in effect for more than one motion picture season and covering the exhibition of features released by one distributor during the entire period of the agreement."

In other words, a franchise agreement was an undertaking to give the franchise holder the distributor's pictures for more than one season.

The restraint of trade as found by the Court could only be interpreted as a holding that the distributor by means of such an agreement prevented himself from selling his product to any other distributor *after the expiration* of the first season.

There was no intimation either in that finding, in the decree or in the opinion of the District Court that fran-

chise agreements were tied up with block-booking. The proof is, and the fact is, that they are not so tied up. There could be franchise agreements without block-booking. What appellants object to is a decree which enjoins them from selling their pictures in block for *one* season.

Franchise agreements were stricken down by the District Court primarily because they tied up a substantial number of pictures for an unreasonable length of time. Finding No. 89 (R. 3675) indicates that clearly:

> "89. Franchises have been entered into by the distributor defendants, and unreasonably restrain trade, because they cover too long a period (more than one season), and also because they embrace all the features released by a given distributor."

The opinion of the District Court even makes that clearer (R. 3541):

> "Franchises which so far as the five major defendants are concerned were forbidden by the consent decree are also objectionable because they cover too long periods (more than one season) and also because they embrace all the pictures released by a given distributor. They necessarily contravene the plan of licensing each picture theatre by theatre, to the highest bidder."

It is manifest that the District Court primarily objected to franchises because they were for too long a period—for more than one season—and that it objected to all the pictures released by a given distributor for that period because that tied up all of the distributor's pictures for a long time—practically took them off the market for three or four or five years. From the limited holding the Govern-

ment seeks to make the deduction that the distributor could not sell all of its pictures for a limited period of one season. The District Court did not so find. Its reason for holding block-booking illegal was based upon the tying-in or conditioning of pictures, as set forth in Finding No. 93 (R. 3676):

> "93. Block-booking, when the license of any feature is conditioned upon taking of other features, is a system which prevents competitors from bidding for single features on their individual merits."

And of course, the District Court had previously found block-booking to be a tying-in or conditioning of pictures (Finding No. 1 R. 3659-60).

To illustrate the difference: Columbia could give an exhibitor a franchise agreement for one Rita Hayworth picture a year for five years. That would involve no block-booking, but would tie up this kind of a picture and keep it away from other exhibitors for five years. It would be a pure franchise agreement and nothing more. Indeed many of the franchise agreements which were stricken down by the decree were for considerably less than the season's product of each distributor, or they gave the exhibitor the choice or selection of a number of pictures only for each season during the franchise period.

Gov. Ex. 472 is a franchise agreement between Columbia and Fox Inter-Mountain Amusement Corporation for a three year period. That document provides (Article X, Subdivision b):

> "In all theatres where the exhibitor has agreed to exhibit *part* of the product only, such commitments shall be *selected* by the exhibitor from the total product. * * *"

Columbia's franchise contract (Gov. Ex. 265), which was made with Evergreen Theatres Corporation for a three year period, likewise contains the identical language.

Gov. Ex. 259 is a franchise agreement between Universal and Warner Bros. for a three year period. In the Appendix to the Government's brief (pp. 103-104) the commitment of the exhibitor is shown to be a *selection* of 30 pictures out of 43.

In the same Appendix there is digested at pages 70-1-2 the franchise agreement for Loew pictures in the Warner theatres (Gov. Ex. 181). The digest states:

> "Right of selection as indicated in deal sheets" (p. 72).

Manifestly it was not the *number* of pictures involved which brought about the restraint. It was the *time element*—the keeping of pictures, whether one or all, off the market for an unreasonable period.

Appellants contend that they have a perfect right to sell a season's product in advance without showing the pictures. The Government assumes that this is a conditioning of product as well as a serious abuse of copyright license privilege, and keeps on distorting appellants' claim. For example, in its Appellees' Brief (p. 45), it says:

> "Columbia apparently insists that franchises are not agreements which are intended to tie a group of copyrights together for a trade restraining purpose. * * *"

That is not appellants' claim.

Let us make it as plain as we know how. Appellants insist that the injunction against franchises was granted to prevent any distributor's product, block-booking or no block-booking, from being tied up for more than one season. And that this has nothing to do with block-booking.

The Government has not pointed out any proof in this record which would justify the District Court in holding block-booking illegal. It hints (Appellees' Br., p. 46) that exhibitors were actually induced by this practice of block-booking to make licenses for films which they did not particularly desire as a means of securing more valuable films that they had to have for profitable operation. That is purely a figment of the Government's imagination. Where in this record is there the slightest proof of such a claim by exhibitors?

Respectfully submitted,

SCHWARTZ & FROHLICH,
Attorneys for Appellants Columbia.

LOUIS D. FROHLICH,
ARTHUR H. SCHWARTZ,
of Counsel.